United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-7300

In the

United States Court of Appeals

For the Second Circuit

B
P/s

Amoco Shipping Company,

Plaintiff-Appellant,

vs.

Humble Oil & Refining Company and M/T Esso Connecticut, her engines, tackle, etc., in rem,

Defendants-Appellees.

BRIEF FOR DEFENDANT-APPELLEE HUMBLE OIL & REFINING COMPANY

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2

TABLE OF AUTHORITIES

Cases:

TABLE OF CONTENTS

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Statement

Amoco Shipping Company (hereinafter Amoco) appeals from a Judgment entered in the Southern District of New York on the Opinion of Marvin E. Frankel, *D.J.*, dated April 14, 1975 dismissing Amoco's complaint against Humble Oil & Refining Company (hereinafter Humble*) for damages allegedly suffered by Amoco as a result of an alleged contact between the S.S. AMOCO DELAWARE and the M/T ESSO CONNECTICUT (owned and operated by Humble) during a lightering operation off Port Jefferson, New York on April 13, 1972.

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* Now known as Exxon Company, U.S.A., A Division of Exxon Corporation.

The District Court concluded that Amoco had failed in its burdens of proving either Humble's liability or that Amoco had suffered any damages as a result of the alleged incident.

Facts

The facts are as stated in Judge Frankel's Opinion (JA 38-43.*)

Briefly, on the afternoon of April 13, 1972, the ESSO CONNECTICUT was tied up along the starboard side of the much larger AMOCO DELAWARE lightering off part of her cargo. The AMOCO DELAWARE was then anchored outside of Port Jefferson Harbor. When the tide changed at about 1700 hours (JA 164, 165) the AMOCO DELAWARE, which was initially heading westerly, swung her stern through the south to head easterly into the flood current. During the swing the ESSO CONNECTICUT, which had been in the AMOCO DELAWARE's lee, was exposed to the action of the seas, and commenced rolling to the point that the masters of both vessels, at approximately 1735 hours, simultaneously decided to separate the two vessels. (JA 109-114, 120-122, 168-169.) The separation was quickly accomplished. About one hour later, after the AMOCO DELAWARE settled on her new heading, the ESSO CONNECTICUT returned alongside and completed the lightering operation without further difficulty. (JA 40, 88.)

It is undisputed that if the AMOCO DELAWARE had taken action with her engines and/or rudder at the change of the tide, she could have (and should have) caused her stern to swing through the north and the ESSO CONNECTICUT would at all times have remained in the AMOCO DELAWARE's lee.

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* JA—Joint Appendix

On the issues of liability, Amoco's own expert, Captain Kingston, totally destroyed all of Amoco's arguments. Kingston established:

(a) The port and berth were safe within the meaning of the charter party. (JA 87, 88.)

(b) A ship's master and officers have a duty to keep a good lookout on the weather and tidal conditions, and do everything they can to prevent damage to their own ship. (JA 80, 81.)

(c) The temporary rolling condition experienced by the ESSO CONNECTICUT would not have occurred if the AMOCO DELAWARE had swung the "right way" with the change of the tide and kept the ESSO CONNECTICUT in her lee. (JA 83, 84, 85, 96, 98, 100, 101.)

(d) Only action by the AMOCO DELAWARE could control the direction of swing of the flotilla. But no engine or rudder action was ever taken by the AMOCO DELAWARE. (JA 100, 101.) The AMOCO DELAWARE was permitted to swing the wrong way.

(e) The rolling commenced quite suddenly, between 1730 and 1735 hours (JA 168, 169), and the action of the ESSO CONNECTICUT in putting out additional fenders was prompt, was not unreasonable under the circumstances, and was worth a try. (JA 85, 88, 89.)

(f) Alternatively, the ESSO CONNECTICUT (which was subject to the orders of the AMOCO DELAWARE) could have been ordered away from the AMOCO DELAWARE earlier if those on the AMOCO DELAWARE had then judged it neces-

> sary. The ESSO CONNECTICUT could not leave in any event until those on the AMOCO DELAWARE stopped pumping petroleum products to the ESSO CONNECTICUT. (JA 86, 87.)

Additionally, Amoco's counsel conceded at the trial that the fenders of the ESSO CONNECTICUT were proper. (JA 126, 127.) This was based on the evidence. (JA 78-80.)

On the basis of the whole record, the District Court concluded the failure of those in charge of the AMOCO DELAWARE to make certain that the ESSO CONNECTICUT remained in the lee of the AMOCO DELAWARE during the lightering operation solely caused the alleged incident. (JA 42.)

Further, the District Court found as a fact an "independently decisive barrier" to Amoco's recovery—Amoco had failed in its burden of proving it suffered "any damage whatever" in the incident. (JA 42.)

The Alleged Errors Below

Amoco here seeks to re-argue factual issues properly decided by the District Court on the whole record. The findings below may not be set aside unless this Court on reviewing the entire evidence is "left with the definite and firm conviction that a mistake had been committed." *McAllister* v. *United States*, 348 U.S. 19, 20 (1954). Humble submits that Amoco cannot sustain its burden of proving the findings below were "clearly erroneous."

The District Court carefully considered each argument raised by Amoco, including those raised on this appeal, and rejected Amoco's contentions.

This appeal has no merit and should be dismissed.

POINT I

Humble Complied With Its Duty Under Clause 9 of the Charter Party—the Berth Was Safe. Nothing in the Charter Party May Properly Be Construed to Require Humble to Indemnify Amoco for Alleged Damage Caused Solely by Amoco's Own Negligence.

The District Court dealt with Amoco's mistaken arguments regarding Clause 9 of the charter party as follows:

> "The finding of fault on the part of the AMOCO DELAWARE is sufficient to dispose of plaintiff's major argument under Clause 9 of the charter party. The subject does not warrant extended discussion. Suffice it to say that the language plaintiff invokes cannot support a claim for alleged damages flowing from its own negligence." (JA 42.)

The portion of Clause 9 of the charter party on which Amoco's argument is based simply states:

> "* * * any lighterage being at the expense, risk and peril of the charterer * * *." (JA 12.)

Judge Frankel's holding is in accord with the law of contracts that before an indemnitee may recover damages flowing from its own negligence, or that of its servants, the court must be firmly convinced that such an interpretation of the contract reflects the intentions of the parties. This court has stated that such intent must be expressed in "unequivocal terms." *Rice* v. *Pennsylvania R. Co.*, 202 F.2d 861, 862, 863 (2 Cir. 1953). The intention of the parties must be clear and unambiguous, necessitating a clause such as "including damages arising from indemnitee's own negligence." *Freed* v. *Great A. & P. Tea Co.*, 401 F.2d 266,

269 (6 Cir. 1968), which was cited with approval in *U. S.* v. *Seckinger*, 397 U.S. 203, 211 (1969).

Clause 9 contains no terms whatsoever expressing any intent by the charterer (Humble) to indemnify the shipowner (Amoco) for damages flowing from Amoco's own negligence. Amoco's argument on the point presents a mistaken view of the authorities—not one of the many cases it cites supports its position.

Humble submits that in Clause 9 (JA 12), the parties have agreed:

(a) the ship may be required to discharge into lighters;

(b) the lighterage is to be procured by the charterer (Humble);

(c) the lighterage is at the expense of the charterer (Humble);

(d) the charterer (Humble) bears the risk of loss of the cargo while on the lighter.

Nothing more can be inferred from the clear simple terms of Clause 9.

Lighterage has been defined as the business of transferring merchandise to and from vessels by means of lighters. BLACK'S LAW DICTIONARY (4th Ed.). If the parties had intended to included liabilities for hull damage occurring to the chartered ship or the lighter during the lighterage operation, that could have been done in clear unequivocal language. The word "lighterage" *cannot* be construed to include such hull damage. For any hull damage occurring during a lighterage operation, the parties are fully protected by their rights under tort law.

Further, Amoco's brief presents a most inconsistent and confusing argument. At pp. 11-17 it cites numerous au-

thorities concerning unsafe ports, then it concedes at p. 17 that the berth and/or port were safe. (It could hardly do otherwise considering the testimony of its expert Kingston at JA 87, 88.) Amoco next argues that the berth became unsafe as a result of the incident with the ESSO CONNECTICUT—wholly overlooking the fact that its own negligence solely created the incident. The safe berth clause is inapplicable when damage to the chartered ship is caused by that ship's own negligence. *President Lincoln—Flying Dragon,* 1964 A.M.C. 1841 (N.D. Cal.) not officially reported.

Also, in its brief p. 18 Amoco raises an argument of breach of implied warranty of workmanlike service because the ESSO CONNECTICUT, with knowledge of the local weather and with insufficient or defective fenders or lines, failed to leave the side of the AMOCO DELAWARE. Nothing in the record shows that those on the AMOCO DELAWARE relied in any way on the ESSO CONNECTICUT with respect to the weather or any other matter. Quite the contrary. Amoco's expert, Kingston, established that the AMOCO DELAWARE had a duty to keep a lookout on the weather and all other factors concerning the AMOCO DELAWARE's safety. (JA 80, 81.) Regarding the fenders, Amoco's attorneys have apparently forgotten the concession at trial that the fenders were proper. (JA 126, 127.)

Nothing in *Fairmont Shipping Corp., et al.* v. *Chevron International Oil Co.,* 1975 A.M.C. 261 (2 Cir. 1975), not officially reported, supports Amoco's argument regarding breach of warranty of workmanlike service. In *Fairmont,* the charterer had agreed to provide tug assistance to a chartered ship. This court held, affirming the District Court, that the contract contained an implied warranty of workmanlike service, that the tugs breached the warranty,

and the chartered ship did nothing to bar her owner's recovery. Here, the lighter was not criticized by the District Court—Judge Frankel found sole fault on the part of the AMOCO DELAWARE—barring Amoco's recovery.

The District Court properly rejected Amoco's arguments under Clause 9.

POINT II

The District Court Properly Found That Amoco's Negligence Solely Caused the Alleged Incident. Amoco's Arguments Are Based on an Erroneous Statement of Facts and a Mistaken Interpretation of the Law.

A. *Amoco's Negligence*

The District Court found that:

> "Prudent management in the circumstances would have entailed action by the master of the s/s Amoco Delaware to make certain that the smaller, lightering craft, the Esso Connecticut, remained on the lee side throughout the operation. This could and should have been ensured by timely use of the Amoco Deleware's engine and/or rudder to make certain that the ship swung with its stern through the north rather than the south. The arrival of the Poling during the swing of the Amoco Delaware did not alter the latter vessel's duty in this respect. As has been noted, the larger vessel could and should have postponed the Poling's arrival alongside for as long as prudent seamanship required. In failing to take timely action to keep the Esso Connecticut on the protected side, those in charge of the Amoco Delaware were negligent, even though this should be and is deemed a case of relatively slight negligence."

That finding is based on ample evidence at trial, including that of Amoco's expert, Captain Kingston, Humble's expert, Captain Wheeler, and on the law.

Kingston testified that it is desirable for a lightering vessel to be in the lee of the larger vessel to prevent damage to both vessels (JA 81); the larger ship's master can take action with her engines and/or rudder to swing the ship one way or another (JA 83); the ESSO CONNECTICUT would have remained in the AMOCO DELAWARE's lee if the AMOCO DELAWARE had swung her stern through the north instead of the south (JA 84, 93-94); Kingston claimed he never had occasion to take action to control the swing of his ships when at anchor because (apparently fortuitously) "* * * we swung the right way anyway." (JA 95.)

Kingston testified most persuasively:

> "THE COURT: What did you mean when you said you swung the *right way* anyway? Would the *right way* in this case have been—
>
> THE WITNESS: The right way—
>
> THE COURT: Listen. Would the *right way* in this case have been to swing so the Esso Connecticut was in the lee, vis-a-vis the Esso Connecticut [sic, Amoco Delaware]?
>
> THE WITNESS: Yes, sir." (JA 95. Emphasis added.)
>
> * * *
>
> "THE COURT: Isn't it within the power of the captain of the Amoco Delaware if the Poling doesn't know better, to keep that other barge off while he finishes unloading onto the Esso Connecticut?
>
> THE WITNESS: It would be within his power, yes.

THE COURT: Wouldn't it have made sense, since they had already started off loading onto the barge?

THE WITNESS: It's very customary to put a lighter on each side and handle both of them.

THE COURT: I realize that, but you have told me that given the choice, the right way was to keep the Esso Connecticut on the lee side.

THE WITNESS: Yes." JA 98.)

References to the Poling barge which came alongside the AMOCO DELAWARE at 1730 hours (JA 40, 96), long after the AMOCO DELAWARE commenced swinging the wrong way are misleading and should be given no weight. Any prudent action by those in charge of the AMOCO DELAWARE to control her direction of swing should have been taken before she swung—before 1700* hours. (JA 164-165.) The AMOCO DELAWARE would then have swung the right way keeping the ESSO CONNECTICUT in her lee and the Poling barge could simply have been held off a short time until the AMOCO DELAWARE steadied on her new heading. (Kingston JA 100-102.)

Humble's expert, Captain Wheeler, had lighters alongside his ships on many occasions. He used a reasonable and logical procedure of anticipating changes in weather and tidal conditions; and when necessary he took action to see that his ships swung the right way to avoid damage to his ship or the lighters and cargo. Captain Wheeler testified that if the motion of the lighter and ship became too severe, the lighter can be broken loose, and if the lighter is not self-propelled it can be trailed astern of the ship. It is a

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* Note: Amoco misstates the time of the change of the tide, brief, p. 4. The tide changed before 1700 hours, not after 1730 hours.

matter of judgment of those on the scene as to when to break loose. (JA 123-131.)

Judge Frankel properly accepted the expert evidence of both Kingston and Wheeler and then followed the sound decisions by a number of courts (including this one) and those of arbitrators in analogous cases.

In *Mackey* v. *United States*, 197 F.2d 241 (2 Cir. 1952) a cargo of coffee was delivered to a ship in lighters arranged and paid for by the shippers while the ship was anchored off Cape Haitien, Haiti. A sudden squall of rain kicked up a very rough sea. During the storm one lighter capsized, losing all of its cargo and cargo on other lighters was damaged. This court held (p. 243-244) the ship was in control of the lighters, and that based on expert testimony "* * * the loss could have been averted by the application of customary procedures such as dropping the lighters astern into the vessel's lee * * *." In *Continental Insurance Co.* v. *SS Alcoa Roamer*, 1957 A.M.C. 1522 (SDNY), not officially reported, Judge Sylvester J. Ryan followed *Mackey* v. *United States* in a similar case.

Clearly it is a reasonable exercise of foresight by those on a large ship to take necessary action to keep a smaller lighter in her lee—to prevent damage to the lighter, her cargo or the ship.

Judge Frankel's opinion is also supported by the logical approach taken by the courts and arbitrators in the following cases—whether a ship is on charter or not, a ship's master may not stand idle while damage, which could easily be avoided, occurs—he must take positive preventative action.

In *Atkins et al.* v. *Fibre Disintegrating Co.*, 2 Ben. 381, 2 F.C. 78, 79 aff'd 18 Wall 272, 85 U.S. 272 (1868), the court denied a recovery to the shipowner and stated:

"The master is the navigator, presumed to know best the channel of the ports within the natural range of the adventure, and the capacities of his vessel, and he is the proper person to determine whether his vessel can or cannot enter any particular port."

* * *

"If, then, the port named was deemed an unsafe port for his vessel, and so not within the privilege given by the Charterer, *it was the duty of the master, as the sole representative of the owners, to have made known his objection at the time. Not having done so he must be deemed to have waived the right to object, and, the condition having been waived, no action can now be maintained for the breach of it.*" (Emphasis added.)

In The Matter of The Arbitration Between Heinrich C. Horn and Christensen Canadian Enterprises Ltd., 1971 A.M.C. 362, 365-366 (N.Y.), not officially reported, the arbitrators stated:

"* * * Not even the safest port in the world is necessarily completely safe all the time. Major ports can become temporarily unsafe . . . This does not *per se* make it unsafe or entitle that label at a given moment. Within the meaning of this charter party, the Panel is concerned with the safety of the port of Grindstone for a vessel of the size and general characteristics of the Stolt Schleswig . . . The temporary and occasional problem of rising wind is a foreseeable hazard requiring prudence and in extreme cases premature sailing. . ."

And the arbitrators denied a recovery to the shipowner holding at page 366 that the damage to the ship:

> "* * * was brought about by an imprudent decision of the Master . . . in not proceeding to the anchorage as soon as the wind started to freshen."

In *The Virginia*, S.M.A. 313 (April 19, 1964) enclosed as Appendix A, the shipowner sought damages caused by contact with improperly fendered barges at the discharge port. The arbitrators held the shipowner was *not* entitled to a recovery because the ship master "took no positive action to prevent damage to his vessel." The arbitrators held that the charterer had directed the vessel to a "safe" anchorage and stated, Appendix 7a:

> "That the master according to the evidence presented, *did nothing more than mention to the Supercargo that the barges or some of them were not properly fendered. He took no positive action to prevent damage to his vessel.* Two of the barges had iron angles at the corners . . . It is the majority opinion that the master should have stopped loading from any barges that were not properly fendered. . ." (Emphasis added.)

The arbitrators also commented that the ship master could have made claim against the owner of the improperly fendered barges. Amoco seizes on this to distinguish *The Virginia*. (Brief pp. 29, 30). But here, as previously noted, Amoco's counsel conceded at the trial that the ESSO CONNECTICUT's fenders were proper (JA 126, 127)—thus Amoco's further argument regarding fenders (Brief pp. 31, 33) is pointless.

B. *The Mistaken Arguments of Amoco's Attorneys*

We submit that Amoco's massive brief will be of no assistance to this Court.

A prime example of Amoco's mistaken arguments is the frivolous contention that the ESSO CONNECTICUT was under way within the meaning of the Rules of the Road for Inland Waters, 33 U.S.C. § 154 *et seq.*—when she was in fact tied firmly to the AMOCO DELAWARE with five mooring lines and also connected by two large cargo hoses. (JA 39, 122). And to suggest there is any similarity between the instant case and *The Oregon*, 158 U.S. 186 (1895) is an insult to this court's intelligence. In *The Oregon*, a ship navigating down a channel on a dark night at a speed of 15 knots negligently collided with a properly lighted anchored vessel.

Amoco's attorneys cite numerous additional irrelevant cases to support arguments which are also clearly inapplicable to the facts here. We will not overburden this court by distinguishing each case or commenting on each argument. We merely note that Judge Frankel considered and properly rejected each such argument.

C. *The District Court Properly Excluded Amoco's Exhibits 4 and 5—Accident Reports Prepared by an Involved Person with a View toward Litigation and with no opportunity for Cross-examination.*

Exhibit 4 is a U. S. Coast Guard Accident Report allegedly prepared by the master of the AMOCO DELAWARE, Captain Jarrett (JA 46, 47); however there is no explanation why it is signed by another person (JA 141, 142). The report is dated July 25, 1972—more than 3 months after the alleged incident. Clearly it was not prepared and filed according to law. The applicable statutes and regulations require the report to be sent to the Coast Guard within 5 days after the accident, 33 U.S.C. §361. See also 46 CFR § 4.05-10. The report is an afterthought,

prepared with a view toward litigation, as is Exhibit 5, a letter from Captain Jarrett to Amoco.

So far as we can determine, no court has ever held an accident report prepared by an involved person admissible in evidence to establish a defense or a *prima facie* case. *Palmer* v. *Hoffman*, 318 U.S. 109 (1943), is the leading case on the inadmissibility of such reports. The circumstances of preparing accident reports are such that hearsay evidence in the form of alleged business records, with no opportunity for cross-examination of the preparer, are too unreliable for admission.

In some few instances accident reports have been held admissible when the reports were prepared by persons not involved in the accident—neutral third parties— persons in all likelihood with no awareness of the manner in which the report might work to their employer's advantage. See *Taylor* v. *Baltimore & Ohio Railroad Co.*, 344 F.2d 281, 286 (2 Cir. 1965); *Gaussen* v. *United Fruit Company*, 412 F.2d 72 (2 Cir. 1969); *Vaccarro* v. *Alcoa SS Co.*, 405 F.2d 1133 (2 Cir. 1968); *U. S.* v. *New York Foreign Trade Zone Operators, Inc.*, 304 F.2d 792 (2 Cir. 1962). Accident reports or business records prepared by a party or his representative are of course admissible against that party. *Caruthersville Towing Company* v. *John I. Hay Co.*, 334 F.2d 376 (5 Cir. 1964); *United States* v. *Dawson*, 400 F.2d 194 (2 Cir. 1968). Neither situation exists in this matter.

The District Court committed no error in holding that Amoco's negligence solely caused the alleged incident.

POINT III

The District Court Properly Refused to Grant Amoco's Several Requests for a Further Trial Continuance Because:

A. There Being No Liability on Humble's Part, There Was No Point in Considering Amoco's Allegations on Damages; and

B. The Allegedly Necessary Witness, Bysarovich, Was *Not* an Eye Witness to the Alleged Incident and Could Not Contribute Material and Competent Evidence to Support Amoco's Case.

Since Amoco's negligence alone caused the alleged incident, there is simply no point in considering Amoco's allegations regarding damages.

In any event, the witness Amoco sought to have testify, Mr. Bysarovich, a Vice President of Amoco, could not support Amoco's claim for damages. Amoco merely alleges regarding Mr. Bysarovich that "* * * as the Supervisor of Marine Operations, he was the individual to whom all bills and surveys were submitted, to whom all reports were made and the one who authorized all repairs." (JA 29.)

Mr. Bysarovich was presumably in an office somewhere at the time of the alleged incident. He did not witness the incident and can give no competent testimony to make the essential link between the alleged indentations on the AMOCO DELAWARE's hull and the alleged repair bill, Exhibit 8. Further, not one of Amoco's witnesses gave competent testimony on the point. Humble's witnesses at the scene testified they examined the AMOCO DELAWARE but found no damage. (JA 112, 114, 115, 151-153.)

When Amoco made its first request to delay the trial to February 10, 1975 because of the unavailability of Mr.

Bysarovich we wrote to Judge Frankel by letter dated January 13, 1975 as follows:

"Dear Judge Frankel:

We understand that you have received a request from plaintiff's attorneys to delay the trial until February 10, 1975 because of the unavailability of an alleged key witness, Mr. Bysarovich.

Plaintiff's attorneys have informed us that Mr. Bysarovich will testify regarding the plaintiff's claim for four days loss of use, prorated shipyard charges and related items. However, we have informed plaintiff's attorneys that because the AMOCO DELAWARE spent approximately four months in the shipyard undergoing shipyard guarantee work and other owner's work, and her time in the shipyard was not extended by the alleged collision damages, there is no valid loss of use claim here. In the circumstances any testimony on the subject by Mr. Bysarovich would probably be fruitless. In our view his absence is no real justification to delay the trial.

However, we neither agree nor object to any extension of time Your Honor may wish to grant."

After first denying Amoco's request (JA 26, 27), Judge Frankel granted it and set the trial for February 10, 1975—the precise date Amoco suggested.

On the eve of trial Amoco made a further request to extend the trial until February 18, 1975. We opposed this request for the reasons stated in our letter to Judge Frankel dated February 5, 1975 as follows:

"Dear Judge Frankel:

Yesterday we were informed that trial in the captioned matter was scheduled to commence on Feb-

ruary 10, 1975. Today plaintiff's attorneys informed us they are seeking a further adjournment of the trial.

We have already arranged for our witnesses to attend and any further adjournment is going to cause substantial inconvenience to defendant's counsel and the defendant's witnesses. We also object on the grounds stated in our letter dated January 13, 1975.

We ask that no further adjournment be granted."

Judge Frankel denied Amoco's request and the trial commenced on February 10, 1975.

At the trial George M. Kellner, also a Supervisor of Marine Operations, testified regarding Amoco's alleged damages. (JA 45-54). After cross-examination Mr. Kellner's testimony was stricken (JA 54-59, 144). Mr. Kellner was not a witness to the event; he was an office man as is Mr. Bysarovich. Any testimony regarding alleged hull damage by Mr. Bysarovich would necessarily be based on hearsay and thus inadmissible also.

Amoco's attorneys made no attempt to take the deposition before trial of Mr. Bysarovich. Had his deposition been taken after trial, it may then have become necessary to take the depositions of additional witnesses for Humble, unduly prolonging the matter.

Considering all the circumstances, Amoco has no just complaint regarding the District Court's application of discretion. *Lamb* v. *Globe Seaways, Inc.*, No. 73-2692 (2 Cir. May 28, 1975).

The District Court properly found no sufficient proof that Amoco suffered any damage whatever as a result of the incident leading to this action. (JA 42.)

POINT IV

There Is No Basis for Allocating Damages in Proportion to Fault Where Amoco's Negligence Solely Caused the Alleged Incident.

While Judge Frankel held that Amoco's negligence "was relatively slight" (JA 41), he found no negligence whatever on the part of Humble. Accordingly, the principle of proportionate fault stated in *United States* v. *Reliable Transfer Co., Inc.*, 43 U.S.L.W. 4610 (U.S. May 19, 1975) is inapplicable.

CONCLUSION

The judgment of the Court below should be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX A

In the Matter of

The Arbitration between A.G. Pappadakis, Owner of the S/S VIRGINIA, and Philippine Merchants Steamship Co. Inc., Charterer

All in connection with a certain Charter Party dated Nov. 29th, 1961, between the Charterers above mentioned and Freighters and Tankers Agency Corporation, as Agents for the Owners above mentioned;

The Arbitration being heard before Mr. Jerry Jenks, Arbitrator, Mr. Bud Stovall, Arbitrator and Mr. Hendrik L. Busch, Chairman.

AWARD

No. 313

Certain disputes having arisen during the performance of the s/s VIRGINIA under the above mentioned Charter Party the Owners and Charterers brought their disputes before the above mentioned Arbitrators, under a Submission Agreement outlining the matters in dispute and signed by Messrs. Haight, Gardner, Poor & Havens as attorneys for the Owner of the s/s VIRGINIA and by Messrs. Zock, Petrie, Sheneman & Reid as attorneys for the Charterers.

The Submission Agreement lists the following items in dispute

1) The Claim of the Owner that it is entitled to recover from Charterer the sum of $10,824.00 for demurrage.

2) The Owner's claim that it is entitled to recover the sum of $3,500.00 from the Charterer because the Charterer ordered the Master to sail from Davao, P.I. for the U.S. West Coast via Yokohama which the shipowner had agreed to only upon Charterer's payment of $3,500.00.

3) The Owner's claim that it is entitled to recover from Charterers a balance of freight due of $2,149.20 which amount was deducted from the payment of freight on account of disbursements which Owner alleges were incorrectly charged to Owner's account.

4) The Owner's claim that it is entitled to recover the sum of $59.03 from Charterer for radiograms.

5) The Owner's claim that it is entitled to recover the sum of $4,462.38 from Charterer for damage to the vessel during loading at Pl[illegible]ide[illegible], Philippine Islands.

The Submission Agreement further stipulated that the Arbitrators' fees and stenographers' fees may be assessed as determined by the Arbitrators as part of their award.

The Arbitrators have carefully considered all of the evidence and arguments submitted by attorneys for both sides and have ruled on each issue as enumerated in the Submission Agreement as follows:

1) By a majority opinion the Arbitrators award to the Owners demurrage for 4 days, 10 hours, 49 minutes or @ $800.00 per day, in the amount of $3,560.56 and rule that adjustment between that amount and the amount held in escrow be made forthwith. The majority arbitrators recalculated the demurrage and reached their demurrage figure by excluding from

laytime all non-weather working days, including surf days at loading ports together with all recognized holidays, such as, Christmas Day, New Year's Day and Rizal Day, and at discharging port including in laytime all the time vessel was waiting for berth, and otherwise basing their calculation on the terms of the Charter Party. There was lengthy discussion as to whether Plaridel was a safe port and whether surf days at that port should be included or excluded. The majority Arbitrators, Mr. Jenks, dissenting, found that Plaridel was a safe port and that surf days there were non-weather working days and should be excluded from laytime. As to the question of whether or not Plaridel was a safe port the Arbitrators, in their majority opinion, find no evidence in any shipping guides that it is considered unsafe for vessels of the size of the s/s VIRGINIA. . port may be safe when a vessel is ordered there but changes in weather or conditions may make it unsafe upon the vessel's arrival there. It then becomes entirely within the Master's judgment and discretion to note the unsafe conditions, protest and demand an alternative port or advise the Owners to hold the Charterers responsible for all damages and delays. In this case the Master did nothing in this regard; indeed he did threaten that if the weather should worsen he *would* declare it an unsafe port. But he never did so declare and the only conclusion can be that he considered it safe during his stay there. More than one eminent authority can be cited to support the majority opinion of the Arbitrators. For the sake of brevity we quote only one in this decision, from the Law of Admiralty by Messrs. Gilmore & Black:

Appendix A

"It seems perfectly clear that the Master of the vessel and not the Charterer (who *may* have no nautical knowledge whatsoever) ought to bear the responsibility for keeping his vessel out of unsafe ports. To make the Charterer the warrantor to the ship of the safety of ports to which he orders her would be senseless, and even to make him (the Charterer) responsible on some fault basis in this regard would be to place responsibility where it does not belong."

2) As to the demand by the Owners that Charterers pay the sum of $3,500.00 to the Owner by reason of "deviation" of the vessel to San Francisco via Yokohama for bunkers instead of via Cebu and Honolulu, the Arbitrators were faced with a most difficult decision. How the Owner can call the routing of the vessel via Yokohama a "deviation", when it meant a shorter voyage, less port delay, and cheaper bunkers is inconceivable. How the cost of this "deviation" was set at $3,500.00 *before* the vessel sailed for Yokohama will forever remain a mystery. It could have been any amount; it was not deviation expense, it was penalty money. From the evidence submitted it was clear that the Owner was well familiar with the Philippine Copra trade. It is conceivable that the Owner ordered the vessel to Cebu because it knew that this would so embarrass the Charterer that the Owner could demand penalty money for rerouting. If there were any valid reasons for the vessel to proceed via Cebu the vessel could have been diverted by the Owners as soon as they knew the course was via Yokohama. This was not done; but a payment of $3,500.00

was demanded for not so doing. The Owner hints in such manner that it just evades positive accusation that the Charterer was engaged in smuggling and for that reason wished to avoid clearing from Cebu. If such was the case the Owner by avoiding Cebu in exchange for $3,500.00 participated in the Charterer's allegedly ill-gotten gains, and made itself, (the Owner) privy to and party to the suspicioned nefarious actions of the Charterers. But it is not the function of the Arbitrators to scold; their function is to rule and award based on their interpretations of the rights and liabilities of the litigants. All the evidence presented leaves no doubt that the Owner did originally order the vessel to proceed via Cebu. All the evidence leaves no doubt that the Charterers were well aware of such orders. The Charterer admits it erred in not having stipulated in the Charter Party that the vessel should be bunkered sufficiently on arrival for loading, to load, shift and depart without rebunkering in the Philippine Islands. Whether or not the Charterer did or did not confirm that he would pay $3,500.00 if the vessel was kept away from Cebu is immaterial here. It seems clear from the evidence presented that the Charterer was aware of the Owner's demand for $3,500.00 prior to the departure of the vessel from the Philippine Islands, and by persisting in directing the vessel via Yokohama, the Charterer accepted the Owner's demand to pay $3,500.00. It is the Owner's inherent right to route and navigate the vessel; because that right was usurped by the Charterer even though to the Owners eventual benefit the Arbitrators unanimously but reluctantly award the Owners the

sum of $3,500.00. Such award in no way indicates that the Arbitrators or any one of them, condone the Owners action.

3) As to the Owners claim that it is entitled to recover from the Charterers the sum of $2,149.20 for disbursements wrongfully charged to the Owners, the Arbitrators have carefully checked the disbursement accounts submitted as against the terms of the Charter and find as follows:

At Taglibaran

For Charterers' Account	
Tugboat services	$ 36.50

At Plaridel

All for owners account

At Davao

For Charterers Account	$164.25
" " "	$ 18.25
" " "	$333.65

The total amount awarded unanimously to the Owners as having been improperly charged against them by the Charterers is therefore $552.65. In addition Owners claim for repairs at Davao for damages suffered by the vessel by the barge "Amparo" at Plaridel. With regard to this item in a majority opinion, Mr.

Jenks, dissenting, the Arbitrators hold that the Charterer is not liable for this damage. Opinion has already been rendered herein as to the safety of the port at Plaridel. The Master, according to the evidence presented, did nothing more than mention to the Supercargo that the barges, or some of them, were not properly fendered. He took no positive action to prevent damage to the vessel. Two of the barges had iron angles at the corners. One of these was the "Amaro", which was not under control of the Charterers. It is the majority opinion that the Master should have stopped loading from any barges that were not properly fendered; and failing that, at least to have made claim for any alleged damages directly against the Owner of the barge and not against the Charterer, who had no control whatsoever over the vessel, its navigation, or its safety. Owners claim for $416.10 at Davao is, therefore, by majority opinion, denied.

4) The Owners claim that it is entitled to recover the sum of $59.03 from Charterers for radiograms has been conceded by Charterers and the Arbitrators unanimously confirm Charterers' concession and award to the Owners the sum of $59.03.

5) The Owners claim that it is entitled to recover the sum of $4,462.38 from Charterer for damage to the vessel during loading at Plaridel, Philippine Islands, is unanimously denied by the Arbitrators. By majority opinion, Mr. Jenks, dissenting, it is held that Charterer was not responsible for such damages in the first instance, and unanimously that the repairs were not put in hand, and the figure of $4,462.38 was

merely a quotation from an American shipyard, and is therefore not worthy of consideration in this dispute.

In summation the Arbitrators award to the Owners as follows:

1) By a majority decision demurrage in the amount of $3,560.56 with the ruling that adjustment between Owners and Charterers be made forthwith to settle the demurrage at that figure.

2) By unanimous decision the Owner is awarded the sum of $3,500.00 to be paid by the Charterer to the Owner forthwith.

3)a. By unanimous decision the Owner is awarded the sum of $552.65 to be paid by the Charterer to the Owner forthwith for disbursements wrongfully charged against the Owners by the Charterers.

b. By a majority decision, Mr. Jenks dissenting, Owners claim for $416.10 for repairs to damages allegedly caused the vessel by the barge "Amaro" is denied.

4) By unanimous decision Owners claim in the amount of $59.03 for radiograms is awarded in its entirety.

5) By unanimous decision Owners claim in the amount of $4,462.38 for damages suffered by the vessel as a result of the barge "Amaro" surging against her is denied in its entirety.

The Arbitrators rule that the adjustments between Owners and Charterers in order to conform to the decisions herein contained shall be made forthwith.

Appendix A

The Arbitrators unanimously, as part of this award, set their fees at $400.00 per Arbitrator, or $1,200.00 in total with payment to be effected by the remittance of $200.00 to each Arbitrator by the Owner and the remittance of $200.00 to each Arbitrator by the Charterer. The Arbitrators further rule that the stenographer's fees shall be borne 50% by the Charterers and 50% by the Owners.

August 19, 1964

Dissenting opinion with reference to whether Plaridel was a safe or unsafe port.

At Plaridel, by reason of her size, the S.S. "VIRGINIA" was obliged to anchor about one mile off shore in the open sea, in a depth of about forty fathoms of water. At this anchorage, there is no protection afforded the vessel by surrounding land to form a bay of any sort, and when the wind blows on shore in any degree of intensity, rough seas make it impossible for barges to come out to the vessel, and in my opinion, renders this roadstead unsafe, as, should the vessel drag her anchor, she could be seriously damaged on nearby reefs.

The Master of the ship acted reasonably in obeying the orders of the Charterers to proceed to Plaridel, for when he arrived there it could be considered safe, as the wind and sea were moderate. However, in my opinion, the port became dangerous and unsafe when the wind shifted and intensified. When this condition arose, he immediately notified the Charterers' agents in writing that the loading operations were dangerous and requested that, to avoid damage to his vessel, necessary steps be taken to avoid any damage. He also stated in his letter, that by continuing to

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